application is *in forma pauperis*, from proceeding to seek special leave. They would be well advised, and no doubt will be assisted by the Chief Registrar of the Supreme Court of Brunei Darussalam, to bear in mind paras 786, 787 and 788 of *Halsbury's Laws of England* 4th Ed. Vol. 10.

We take the view that this application is misconceived and we will make no order upon it.

Solicitors: *Ibrahim Chee & Co.*

PUBLIC PROSECUTOR v. WONG KOK SEIN & ORS.

[C.A. (Yang P., Silke & Godfrey JJ.)
30 May & 1 June 1988]

[Bandar Seri Begawan – Criminal Appeal No. 13 of 1987]

Criminal Procedure – Sentencing – Whether sentences for kidnapping and extortion should run concurrently or consecutively – Whether totality of the sentences was inadequate – Criminal Procedure Code (Cap. 7), s. 13(1).

Criminal Law – Kidnapping and extortion offences – Whether offences form two distinct incidents or one single transaction – Penal Code (Cap. 22), ss. 34, 365 & 385.

The respondents pleaded guilty to criminal charges of kidnapping and extortion. The trial court ordered the sentences for kidnapping and extortion to run concurrently. The Public Prosecutor appealed against the trial court's decision on the ground that the concurrent sentences were wrong in principle and should have been ordered to run consecutively. Reliance was placed on section 13(1) of the Criminal Procedure Code for this contention. The Public Prosecutor also contended that kidnapping and extortion constituted not only two distinct offences but also two distinct incidents, and it was wrong for the trial court to view these two offences as forming one transaction.

Held, dismissing the appeal: (1) that the accused were charged with distinct offences does not mean the distinct offences must be necessarily considered to be distinct incidents;

(2) section 13(1) simply provides the "mechanics" of sentencing and gives no direction as to preference or priority between consecutive and concurrent sentences;

(3) on the facts of the case, the trial court was perfectly entitled to come to the conclusion that the kidnapping and the extortion constituted one transaction. The trial court did not err in principle.

Cases referred to:

(1) *R.* v. *Jones* (1980) 2 Cr. App. R. (S) 152 (refd).
(2) *R.* v. *Kastercum* (1972) 56 Cr. App. R. 298 (refd).
(3) *R.* v. *Faulkner* (1972) 56 Cr. App. R. 594 (refd).
(4) *R.* v. *Wheatley* (1983) 5 Cr. App. R. (S) 417 (refd).
(5) *R.* v. *Dillon* (1983) 5 Cr. App. R. (S) 439 (refd).
(6) *Lee Chow Meng* v. *Public Prosecutor* [1976] 1 M.L.J. 287 (refd).
(7) *Hashim bin Pawanchee & Anor.* v. *Public Prosecutor* [1988] 2 M.L.J. 66 (refd).
(8) *Attorney-General* v. *Dominic Cheung Kai Man* Application of Review No. 1 of 1987 (refd).
(9) *Attorney-General* v. *Lau Chiu-tak* [1984] H.K.L.R. 23 (folld).

COURT OF APPEAL.

Ivan Leong (Deputy Public Prosecutor) for the appellant.

Y. Y. Chin for the first respondent.

Raymond Szetu for the second, third and fourth respondents.

Ferida Abang Zen for the fifth respondent.

Cur. Adv. Vult.

Yang P. (delivering the judgment of the court): This is the Public Prosecutor's application for review of sentence on the grounds that the sentences imposed upon the respondents are wrong in principle and/or manifestly inadequate.

At the hearing of the application, however, Mr. Ivan Leong, on behalf of the Public Prosecutor, does not seek to argue that the individual sentences imposed on each of the defendants are inadequate but seeks to argue that the concurrent sentences imposed are wrong in principle in that they should have been ordered to run consecutively. Furthermore he argues that, because the sentences have been ordered to run concurrently, the totality of the sentence on each of the respondents is inadequate. This argument does not relate to D5 who was but 14 years of age at the time of the offence and was placed on a bond and probation. As Mr. Leong does not seek to pursue his application for review in respect of D5, the application as far as D5 is concerned is dismissed. We are therefore concerned only with D1, D2, D3 and D4.

D1, D2 and D4 pleaded guilty to kidnapping, contrary to section 365 read with section 34 of the Penal Code. D3 pleaded guilty to abetting the kidnapping under the same section. D1, D2, D3 and D4 also pleaded guilty to extortion contrary to section 385, also read with section 34 of the Penal Code. The facts of the case are as follows.

On the evening of 8 April 1987, the victim, a 12-year-old boy, was kidnapped near his tutor's flat and bundled into a waiting car. The man who seized the boy was D1. The car was driven by D5, with D4 seated by the side of the boy at the back. On arrival at their destination, the boy was blind-

folded and chained to a padlock in the wall in a room. Over the next two days, D1 carried on a series of negotiations with the victim's family by telephone. He warned the boy's aunt, who acted as the family's spokesman, that unless a ransom was paid, the boy would be tied up and abandoned in the jungle.

According to the agreed facts, D1 simply said that if the family did not come up with the money, the kidnappers would tie up the victim and abandon him in the jungle and they could look for him. D1 did say that he would not kill the victim, but the aunt replied that if they failed to find him that would tantamount to killing the boy. The ransom originally demanded was $2 million, reduced to $600,000 after negotiation. The first half of that $600,000 was to be paid on the night of 10 April, the second half on the following day.

The family reported the matter to the police. A first instalment of $300,000 was paid and the boy was released an hour later. The second instalment of $300,000, however, was not collected. Of the ransom collected, D1 received $100,000 and D2 a similar amount. D4 and D5 each received $50,000. Each of these four defendants paid something to D3 and, as a result, D3 received $25,000. All the defendants had a clear record.

The Chief Justice, in passing sentence, noted that the maximum sentence for the offence of kidnapping was ten years plus a fine, and that for the offence of extortion was seven years or with a fine or both. He noted that the maximum seemed to him to be far too low. Taking all the circumstances into consideration, and in particular the role which each of the defendants played, the Chief Justice imposed the following sentences: D1 – five years for kidnapping and three years for extortion; D2 – six years for kidnapping and three years for extortion; D3 – 18 months for kidnapping and 12 months for extortion; and D4 – three years for kidnapping and two years for extortion, each set of sentences to run concurrently.

In imposing concurrent sentences, the Chief Justice had this to say: "Whilst it is possible to abduct under section 365 without any extortion under section 385, the two normally go together, except in the case of abduction for political purpose. In this case, the kidnapping was executed purely for the purpose of extortion and, not without reluctance, I have decided to impose concurrent sentences on the first four defendants."

The main thrust of Mr. Leong's argument is that the kidnapping and the extortion constituted not only two distinct offences but also two distinct incidents. It was therefore wrong for the Chief Justice to view these two offences as forming one transaction.

Clearly, if the two offences, as Mr. Leong argues, constituted two distinct incidents, consecutive sentences might well have been passed in this case. However, on Mr. Leong's own concession that the culprits' intention was to kidnap in order to extort money, it is difficult to see how it could then be argued that we are dealing not with one single transaction but two. That the accused were charged with distinct offences does not mean the distinct offences must be necessarily considered to be distinct incidents.

In support of his contention that consecutive sentences should have been imposed, Mr. Leong drew our attention to section 13(1) of the Criminal Procedure Code, which provides:

> "When a person is convicted at one trial of 2 or more distinct offences, the court may, subject to the provisions of section 71 of the Penal Code, sentence him for such offences to the several punishments prescribed therefor which such court is competent to inflict, such punishments to commence the one after the expiration of the other in such order as the court may direct unless the court directs that such punishments shall run concurrently."

The wording of this sub-section, it is submitted, directs the sentencing judge to first consider imposing consecutive sentences and only to resort to concurrent sentences as an alternative. We are unable to read the sub-section in the manner suggested. As we have already indicated during argument at the hearing, this sub-section simply provides the "mechanics" of sentencing and gives no direction as to preference or priority between consecutive and concurrent sentences.

Then Mr. Leong seeks to argue that as there has been at least one reported case of kidnapping for extortion each year over the past five years, there is a prevalence of such offences in Brunei, having regard to the size of the population in this country. We do not think there is any substance in this argument. But that is not to say that we reject his submission that kidnapping and extortion are very serious offences. On the contrary, we entirely agree that these are appalling crimes and should be punished accordingly.

A number of authorities were then cited to us, notably *R.* v. *Jones;*[1] *R.* v. *Kastercum;*[2] *R.* v. *Faulkner;*[3] *R.* v. *Wheatley;*[4] *R.* v.

Dillion[5] and two Malaysian cases, namely, *Lee Chow Meng* v. *Public Prosecutor*[6] and *Hashim Bin Pawanchee & Anor.*[7] We do not think it necessary to comment on any of these authorities save to say that we have considered them.

In this connexion we refer to the judgment in the Hong Kong case of *Attorney-General* v. *Dominic Cheung Kai Man:*[8]

"If the offences are distinct and separate it will normally be the duty of the judge to pass consecutive sentences, even if the seriousness of the individiual offences means that the total sentence will be more than could have been passed in respect of any one of them – the totality principle requires the court in the last instance to take a look at the total and to see whether, in the circumstances, it is just and appropriate and if not to reduce it accordingly."

On the facts of the case, we are of the view that the Chief Justice was perfectly entitled to come to the conclusion that the kidnapping and the extortion constituted one transaction. The Chief Justice did not err in principle.

The next question is whether the totality of sentences on each of the four defendants is manifestly inadequate. In this connexion we need refer to only one Hong Kong decision.

In *Attorney-General* v. *Lau Chiu-tak*[9] where Huggins V.P. said at p. 25:

"It follows from what we have just said that the test of manifest inadequacy is no different from the test of manifest excessiveness and that the same test must be applied whether the case happens to be an appeal brought by the appellant or a review at the instance of the Attorney General. Nevertheless, we emphasize that this court will be much more easily persuaded that a sentence is manifestly excessive than that it is manifestly inadequate – not because the test is different but because there is a presumption *in favorem libertatis* which the Crown has to overcome: see *R.* v. *Bitter* [1981] 27 S.A.S.R. 183, 185. The power of review was conferred to correct errors in exceptional cases and the court will be jealous to prevent encroachment on the discretion of judges and magistrates to impose a lenient sentence as they may think appropriate, provided that the sentence is one which in all the circumstances could reasonably be passed."

We are content to apply those principles to a review of sentence by the Public Prosecutor in Brunei. Here, we are unable to say in this case that the sentences were manifestly inadequate. Accordingly, the application is dismissed.

Order accordingly.

Solicitors: *Yong Wong & Chin; Szetu & Co.; D.F. Abang Zen.*

FRANCIS DANG ANAK NUYA v. PUBLIC PROSECUTOR

[C.A. (Yang P., Silke & Godfrey JJ.) 28 & 30 May 1988]

[Bandar Seri Begawan – Criminal Appeal No. 6 of 1987]

Criminal Procedure – Sentencing – Whether life imprisonment sentence for culpable homicide not amounting to murder is a sentence fixed by law – "Shall be punished with imprisonment for life" – "Not exceeding" – Meanings of – Effect of s. 39 of the Interpretation and General Clauses Act (Cap. 4) – Penal Code, ss. 6, 45, 53, 304, 305 – Interpretation and General Clauses Act (Cap. 4), s. 39 – Supreme Court Act (Cap. 5), s. 6(6) – Sarawak, North Borneo and Brunei (Courts) Order in Council 1951, s. 18(1)(c) – UK Criminal Appeal Act 1907.

The appellant was convicted and sentenced to life imprisonment for committing culpable homicide not amounting to murder (see [1988] 1 M.L.J. 89). The appellant appealed against this sentence to the Court of Appeal, contending that the phrase "shall be punished with imprisonment for life" contained in section 304 of the Penal Code is not a sentenced fixed by law.

Held, dismissing the appeal: (1) the punishment of "imprisonment for life" referred to in section 304 of the Penal Code is a sentence fixed by law;

(2) section 39 of the Interpretation and General Clauses Act (Cap. 4) does not affect the fixed nature of that sentence other than it would not permit any sentence greater than life imprisonment (*i.e.* death) being imposed.

Cases referred to:

(1) *R.* v. *Assa Singh* [1965] 1 All E.R. 938 (refd).
(2) *Chung Kum Moey* v. *Public Prosecutor* [1967] 1 M.L.J. 205 (follD).
(3) *Mohamed bin Jamal* v. *Public Prosecutor* [1964] M.L.J. 254 (follD).

COURT OF APPEAL.

Daljit S. Sandhu for the appellant.

Ivan Leong (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Silke J. (delivering the judgment of the court): Francis Dang anak Nuya – the appellant – was charged under section 302 of the Penal Code with murder – the intentional causing of the death of Jelenni anak Jawing on 3 April 1986. At the trial on 20 May 1987, he pleaded not guilty to murder but guilty to culpable homicide not amounting to murder. The Deputy Public Prosecutor, Mr. Ivan Leong, who appeared for the Public Prosecutor both at the trial and in this court, agreed to such a plea but as one based on that which he termed "the first limb of section 304". This plea was accepted by Macdougall J. sitting as a judicial commissioner.